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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of LESLIE MARY and
JEFFREY A. PARRIS.

LESLIE MARY PARRIS,

Appellant,

v.

JEFFREY A. PARRIS,

Respondent.

G040900

(Super. Ct. No. 01D011097)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David S. Weinberg, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Alan S. Yockelson for Appellant.

Law Offices of Steven E. Briggs and Steven E. Briggs for Respondent.

Leslie Mary Parris appeals from a judgment after the trial court entered judgment in Jeffrey A. Parris's petition for dissolution of marriage. She contends the trial court erroneously concluded it was bound to accept a special master's report regarding the division of personal property because it was a statement of decision and her objection was untimely. She also complains the court abused its discretion in awarding attorney fees and sanctions. None of her contentions have merit, and we affirm the judgment.

FACTS

Leslie Mary Parris (Leslie) and Jeffrey A. Parris (Jeffrey)¹ were married on July 25, 1987, and their son, James, was born in November 1990. They separated in November 2001, and the same month, Jeffrey filed a petition for dissolution of marriage. A few days later, Leslie responded.

In April 2002, the parties stipulated to the assignment of the case to retired Commissioner David S. Weinberg. In November 2002, the parties entered into a series of stipulations.² As relevant here, they stipulated to the following: "Robert Bergen is appointed as the Special Master to make recommendations to the court regarding the character, value, and distribution of the household furniture and furnishings, objects of art, collectibles, jewelry, and other household contents. The parties shall equally share in the fees charged by . . . Bergen." (Hereinafter we will refer to this document as the Special Master Stipulation.) One year later, the trial court awarded legal and physical custody of James to Jeffrey.

¹ We refer to Leslie and Jeffrey by their first names for clarity and ease of reference, and intend no disrespect. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

² In the parties' second stipulation, they agreed Jeffrey would pay Leslie \$550,000 within approximately 30 days, and Leslie would waive any right to additional spousal support.

On January 21, 2004, a special master hearing was held. On February 10, 2004, Bergen (the Special Master) completed his “Report of Special Master” (the Report).³ The Report explained the parties stipulated to a third-party appraisal of personal property. Exhibit A included appraisals of personal property each party possessed. The Report stated each party should be awarded the items listed in their respective appraisals at the items’ charged values. The Report also noted exhibit B included personal property in Leslie’s possession in which Jeffrey had no interest. The Report stated Leslie should be awarded these items at no value.

The Report indicated that exhibit C included all the personal property that is disputed. The Report explained Leslie stated Jeffrey possessed all the items in exhibit C, and Jeffrey asserted he had not seen exhibit C before the hearing, but after reviewing the document he admitted possessing some of the items and said some of the items were included on the third party appraisals. The Report stated the Special Master ruled each party was to provide him with the location, character, and value of the items in exhibit C. The Report stated Jeffrey complied with the ruling, but Leslie did not. The Report stated that as to the exhibit C items listed in the third party appraisals, no further recommendation was necessary because those items were previously charged to their respective parties. The Report stated that with respect to the seven items Jeffrey indicated were in his possession, they were awarded to him at the values indicated (\$1,662). The Report stated that as to the remaining items, the Special Master could not make a recommendation because there was no evidence as to their location.

Finally, the Report indicated exhibit D also included a list of disputed items. The Report stated Leslie represented the items were in her possession and the items on pages d-3 and d-4 were gifts and were her separate property. Jeffrey stated they were gifts, but they were purchased as a community investment. The Report stated the

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The Special Master served the Report on the parties on February 18, 2004.

Special Master requested each party provide him with the location, character, and value of the items in exhibit D. Jeffrey complied with the request and noted some of the items on d-2 were on exhibit C. Based on Leslie's testimony she possessed the items on exhibit D but none of the items on exhibit C, and the fact numerous items were on both exhibits, the Special Master stated the discrepancy raised a credibility issue and "all issues of credibility of the witnesses . . . should be weighed in the favor of [Jeffrey]." The Report stated the items listed on d-1 and d-2 should be awarded to Leslie as community property at their specific values (\$37,841). The Report also stated the jewelry listed on d-3 and d-4 should be awarded to Leslie as her separate property at no value and the non-jewelry at the specific value.

In March 2005, Jeffrey filed a notice of intent to seek sanctions pursuant to Family Code section 271. On August 28, 2006, Leslie appeared with new trial counsel. After the trial court delineated the remaining issues, the trial court discussed Jeffrey's position concerning the Report. The court stated Jeffrey's counsel, off the record, argued that pursuant to Code of Civil Procedure section 644,⁴ the Report was the court's judgment and the 10-day objection period had expired. After Leslie and Jeffrey testified, the court returned to the issue of the Report. The court explained it felt "duty bound" to accept the Report as the court's judgment but wanted to address any ambiguity in the Report. Leslie's counsel responded that although he was not conceding he agreed with the Report, exhibits A, B, C, and d-1 and d-2 were clear but d-3 and d-4 were not. Leslie's counsel contended there were five items on d-3 and d-4 the Special Master believed should be charged to Leslie that were either gifts or things she never received (item Nos. 3, 7, 11, 12, and 13). The court replied Leslie's counsel was objecting to the Report, and not claiming it was ambiguous. After discussion concerning the Special Master's credibility determination, exhibit D's origin, and whether the Special Master

⁴ All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

could be contacted, the court continued the matter to October. That same day, Jeffrey's counsel filed a declaration and supporting document regarding attorney fees and costs.

In September 2006, Jeffrey filed his income and expense declaration and his trial brief on reserved issues. The next month, Leslie's counsel filed a declaration and supporting documents regarding attorney fees and costs. Leslie filed an income and expense declaration.

At the hearing on October 30, 2006, the trial court indicated the two remaining issues were the Report and attorney fees and costs, and that it had received Leslie's written objection to the Report. Leslie's counsel began by stating that for the sake of judicial economy, Leslie would stipulate exhibits A and B were correct, and the parties stipulated they were acceptable. Leslie's counsel objected to exhibits C and D and argued the Special Master Stipulation authorized the Special Master to make "recommendations" and not a final ruling. He argued further the Special Master Stipulation was silent on time limits for objecting to the Report and section 638, which governs the parties' stipulation to a referee, does not include any time limits. With respect to exhibit C, Leslie's counsel contended Jeffrey possessed all the items. The court stated that pursuant to sections 638 and 632 the time for objecting had passed. After having represented section 638 was the governing statute, Leslie's defense counsel retreated and claimed the Special Master Stipulation governed. Jeffrey's counsel contended the parties appointed the Special Master pursuant to section 638. The court raised the issue of whether section 638, or section 639, which governs the court's appointment of a referee, was applicable. Jeffrey's counsel argued that under either section, Leslie's objections were untimely. Leslie's counsel argued extensively concerning the valuations of items and stated that at the time of the Special Master hearing, d-3 and d-4 did not exist and d-1 and d-2 did not include prices. Jeffrey's counsel asserted any objections to the Special Master Report were untimely and the valuations seemed proper, and he requested the court make the Special Master Report the

court's order. The trial court explained it would send a transcript of the hearing to the Special Master and request a response. Jeffrey's counsel then requested attorney fees and sanctions, and argued additional contributions were inappropriate. The matter was continued to November.

At the November 7, 2006, hearing, Leslie's counsel contended Jeffrey's income and expense declaration was incomplete and untimely, and his request for sanctions had doubled since he filed his notice of intent to seek sanctions. Leslie's counsel also argued she had overpaid attorney fees and requested contribution. Leslie's counsel also argued Jeffrey's counsel had improper ex parte communications with the Special Master and the court-appointed evaluator which tainted the trial and she made numerous requests for mistrial. Jeffrey's counsel argued that pursuant to court rules, his income and expense declaration was timely and although one item on the declaration was incomplete, Jeffrey brought documents to court to prove his company's value. Jeffrey's counsel denied any improper ex parte communications. The trial court denied Leslie's mistrial motions and indicated it would wait receipt of the Special Master's response before proceeding. On November 14, 2006, Leslie filed her objection to the Report.

In February 2007, the Special Master responded and stated he reviewed, among other things, the Report, the hearing transcript, and Leslie's objections to the Report. The Special Master stood by his recommendations as to exhibit C. The Special Master explained he received exhibit D, which included pages d-1 through d-4, before the hearing and provided it to both counsel to provide values on each item. He stated Jeffrey complied within the time limit, but Leslie requested additional time. The Special Master indicated he never received exhibits 7 and 14, Leslie's January 29, 2004, letter concerning exhibit D, prior to preparing the Report.

The following month, Leslie replied. She disputed the Special Master's assertion she did not provide him with additional information as to exhibits C and D or exhibits 7 and 14. She asserted the Special Master's response ignored her primary

complaint concerning the value and location of items in exhibits C and D. She also claimed the Special Master was biased against her and he failed to address this claim in his response.

Two months later, the trial court issued its decision. The court explained the Special Master Stipulation “could have only been grounded in . . . [s]ection 638,” and therefore, the Report was the Special Master’s statement of decision. The court stated that pursuant to statute the time to object to the Report had expired. Thus, the court reasoned that pursuant to section 644, the Report was the trial court’s judgment. With respect to attorney fees and costs, the court stated each party had demonstrated a need for contribution and an ability to contribute. The court explained the recent litigation concerning child custody was “ill advised” and ordered Leslie to contribute \$10,000. Finally, the court sanctioned Leslie \$7,500 for delaying escrow.

On June 16, 2008, the trial court entered judgment. Notice of entry of judgment was filed on July 10, 2008. Leslie timely appealed.

DISCUSSION

I. The Special Master’s Stipulation

A. General or Special Reference?

Leslie argues the trial court erroneously concluded it was bound to accept the Report as its final judgment without considering her objections because the Special Master Stipulation was a “special reference” that required the court to independently consider the Report and make its own findings. We agree.

Section 638 states: “A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties: [¶] (a) To hear and determine any or all of the issues in an action or proceeding,

whether of fact or of law, and to report a statement of decision. [¶] (b) To ascertain a fact necessary to enable the court to determine an action or proceeding. . . .”

Section 644 provides: “(a) In the case of a consensual *general reference* pursuant to [s]ection 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court. [¶] (b) In the case of *all other references*, the decision of the referee or commissioner is only advisory. The court may adopt the referee’s recommendations, in whole or in part, after independently considering the referee’s findings and any objections and responses thereto filed with the court.” (Italics added.)

“The Code of Civil Procedure provides for two types of reference. A ‘general’ reference is conducted pursuant to section 638, subdivision 1: the referee is empowered to make a conclusive determination without further action by the court. [Citation.] In order to comport with the constitutional prohibition against delegation of judicial power, a general reference requires consent of the parties. [Citations.] ‘[I]f the reference is by agreement of the parties, the parties can stipulate to the special master making determinations which otherwise would be an unlawful delegation of judicial authority.’ [Citation.] [¶] A ‘special’ reference is one conducted pursuant to section 639 or subdivision 2 of section 638, in which the referee makes advisory findings which do not become binding unless adopted by the court. [Citations.] The trial court must independently consider the referee’s findings before acting. [Citations.] But the referee’s recommendations are entitled to great weight. [Citation.]” (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1208, fn. omitted.) Unless it clearly appears from the parties’ agreement that a general reference was intended, a reference is presumed to be a special reference. (*Lewis v. Grunberg* (1928) 205 Cal. 158, 161; *Estate of Johnson* (1970) 12 Cal.App.3d 855, 860.)

Here, the parties stipulated to the appointment of a special master. As the parties stipulated to the appointment, and the appointment was not by the court (§ 639), the Special Master Stipulation was necessarily made pursuant to section 638. The inquiry then is whether the Special Master Stipulation was a general reference, a conclusive determination without further action by the court, or a special reference, advisory findings which do not become binding unless adopted by the court. Based on the Special Master Stipulation's language, and the presumption favoring special references, we conclude the Special Master Stipulation was a special reference.

The Special Master Stipulation provided: “. . . Bergen is appointed as the Special Master to make *recommendations* to the court regarding the character, value, and distribution of the household furniture and furnishings, objects of art, collectibles, jewelry, and other household contents. The parties shall equally share in the fees charged by . . . Bergen.” (Italics added.) The plain meaning of this language indicates the parties contemplated the Special Master would determine the character, value, and distribution of all personal property and make a “recommendation” to the trial court concerning the division of the personal property. The parties' choice of the word “recommendation” indicates they envisioned the trial court would rely on the Report in making its determination as to the division of property, and that further action of the court was necessary. Use of the word “recommendation” is inconsistent with the conclusion that parties intended the Special Master “[t]o hear and determine any or all of the issues . . . and to report a statement of decision.”

Additionally, the presumption is against finding a general reference unless the parties clearly contemplated one. The Special Master Stipulation's language does not compel the conclusion the parties intended a general reference on the issue of the division of personal property. Therefore, the trial court erroneously concluded it was bound by the Report. But that does not end our inquiry. We must now determine whether Leslie's objection was timely. We conclude it was not.

B. Waiver of Objection to the Report?

Leslie claims the trial court erroneously concluded her objection to the Report was untimely because she could object to the Report at any time until the trial court accepted the Report as its final decision. We disagree.

Section 645 states: “The decision of the referee appointed pursuant to [s]ection 638 or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the decision reported has the effect of a special verdict.”⁵

“‘[S]ection 645 provides that a party may object to the findings of a referee If the referee has failed to consider certain evidence, the party whose interest is affected must notify the referee as soon as possible, whether during the reference or after the report is issued, so that the referee may have a chance to rectify any oversight or error [she] may have made. If no change to the report is necessary, the party’s objection should nonetheless be noted in the report. [¶] Alternatively, the party may move to set aside the report. Such a motion should be made promptly following the date the report is filed with the court The failure to file a written objection to the contents of the referee’s report or to properly move to set aside the report results in the waiver of the right to object to the referee’s findings.’ [Citation.] . . . Section 645 itself does not set forth the specific limit articulated in section 632, or any time limit. A prompt objection, made as soon as possible, will put opposing parties on notice, and afford the referee the opportunity to correct any errors in, or unsupported portion of, her report.” (*In re Marriage of Demblewski* (1994) 26 Cal.App.4th 232, 237, italics omitted.)

Here, the Special Master served the Report on the parties on February 18, 2004. Leslie did not object to the Report until August 28, 2006, and on that date she

⁵ We note section 643, subdivision (c), states that if a referee is appointed by a trial court pursuant to section 639, any party may object to the referee’s report within 10 days or within any time as the court directs.

objected orally during the hearing. It was not until October 30, 2006, that the trial court apparently received Leslie's written objection to the Report, and her objection was not filed until November 14, 2006. Therefore, Leslie's earliest objection to the Report was two years, six months, and 10 days after the Report was served. And she never properly moved to set aside the report after it was filed.⁶ Rather, she stipulated some portions of it were correct. Although Leslie changed trial counsel during this time, under no definition was her objection to the Report timely. We reject her contention that she could attack the Report "any time before the trial court adopted the [R]eport" as its final judgment. Any objection must be prompt or as soon as possible to avoid the possibility a special master's memory may fade. Indeed, here, the Special Master replied that "due to the passage of time" he did not feel comfortable commenting on his credibility determination beyond what he concluded in the Report.

II. Attorney Fees & Sanctions

A. Attorney Fees

Leslie argues the trial court erroneously ordered her to contribute \$10,000 to Jeffrey's attorney fees and costs, and failed to order Jeffrey to contribute to her attorney fees and costs. We disagree.

Family Code section 2030, subdivision (a)(1), authorizes the trial court to order one party to pay the other party's attorney fees "if necessary based on the income and needs assessments" to "ensure that each party has access to legal representation to preserve each party's rights. . . ." The court may order payment of "whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." (*Ibid.*) The court may award attorney fees and costs "where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties."

⁶ The Report Leslie included in her appendix is not file stamped.

(Fam. Code, § 2032, subd. (a).) In determining what is just and reasonable, “the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party’s case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in [Family Code] [s]ection 4320.” (Fam. Code, § 2032, subd. (b).)

Here, Leslie’s counsel declared he billed \$341,058.35 in attorney fees and costs. Jeffrey’s counsel declared he billed \$157,882.90 in attorney fees and costs. At the October 2006 hearing, Jeffrey’s counsel argued he should not be required to contribute further as he had made sufficient contributions and requested \$40,000 in attorney fees concerning unnecessary custody issues. At a later hearing, Leslie’s counsel contended Jeffrey’s income and expense declaration was untimely and incomplete. Jeffrey’s counsel responded the declaration was timely and he had brought boxes of financial records to court. The court explained it evaluated each party’s need and ability to pay and each party had demonstrated a need for contribution and an ability to contribute. The court explained the recent litigation concerning child custody was “ill advised” and “[a] much more prudent use of resources was better devoted to the actual reunification process than the process that unfolded as a result of tactical decisions made by [Leslie] that frustrated and delayed her very goal.” The court ordered Leslie to contribute \$10,000 to Jeffrey’s attorney fees and costs.

Leslie complains the trial court abused its discretion in requiring her to contribute to Jeffrey’s attorney fees and costs because (1) Jeffrey’s income and expense declaration was incomplete because it did not include a value for “11c. All other property[,]” and (2) the court failed to consider that almost half of her assets were from the \$550,000 spousal support settlement. Neither claim is persuasive.

Leslie relies on California Rules of Court, rule 5.128 (Rule 5.128) to support her claim Jeffrey’s income and expense declaration was incomplete. Rule 5.128(b) provides: “When a party is represented by counsel and attorney’s fees are

requested by either party, the section on the *Income and Expense Declaration* pertaining to the amount in savings, credit union, certificates of deposit, and money market accounts must be fully completed, as well as the section pertaining to the amount of attorney's fees incurred, currently owed, and the source of money used to pay such fees." This rule requires the party to provide information for sections 11a and 16 on the income and expense declaration but not 11c. Leslie cites to no authority, and we found none, to support her contention this information must be provided.

As to her other claim, the trial court explained it considered and balanced the parties' need and ability to contribute. The court concluded Leslie's tactical decisions concerning child custody caused Jeffrey to incur additional attorney fees and costs. Based on the court's reasoned explanation concerning each party's need and ability to contribute, we conclude implicit in that finding was that the court considered the spousal support settlement. Additionally, based on Leslie's income and expense declaration, the trial court could reasonably order her to contribute \$10,000 after subtracting the spousal support settlement (\$550,000) from her total assets (\$1,124,263) which left a total of \$574,263. Therefore, the trial court properly ordered Leslie to contribute \$10,000 to Jeffrey's attorney fees and costs.

B. Sanctions

Leslie complains the trial court erroneously imposed \$7,500 in sanctions when Jeffrey originally requested \$3,500 without any additional evidence to support the increase. Not so.

Family Code section 271, subdivision (a), authorizes a trial court to award attorney fees and costs as a sanction based on "the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." The party requesting an attorney fees award under

Family Code section 271 “is not required to demonstrate any financial need for the award.” (*Ibid.*)

“[Family Code] section 271 sanctions have been upheld for ‘obstreperous conduct which frustrated the policy of the law in favor of settlement, and caused the costs of the litigation to greatly increase.’” (*In re Marriage of Freeman* (2005)

132 Cal.App.4th 1, 6.) Although a trial court has broad discretion in awarding Family Code section 271 sanctions, subdivision (a), of that section states, “[t]he court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed.”

Here, in January 2003 Jeffrey requested \$3,500 in sanctions alleging Leslie deliberately refused to sign escrow instructions and the delay in closing escrow caused Jeffrey to incur additional attorney fees. His request for sanctions was supported by his declaration detailing his efforts in selling the family home and securing Leslie’s signature on the escrow instructions.

At the October 2006 hearing, Jeffrey’s counsel requested \$7,500 in sanctions “which provides for the preparation of that application and the proceedings that were calendared for February 17, 2003” Leslie’s counsel objected and argued there was no basis for granting any sanction and alternatively, no basis for granting any sanction above the \$3,500 amount.

Leslie does not argue there was no “sanctionable conduct,” and therefore, she concedes the record includes evidence her refusal to sign the escrow instruction delayed escrow closing and resulted in Jeffrey incurring additional attorney fees. Instead, she complains Jeffrey did not produce any new evidence to support the increased amount.

“[T]he sanction must be scaled to the payor’s ability to pay and must be made in light of both parties’ financial circumstances. [Citation.]” (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 827-828.) The trial court explained it evaluated each party’s need and ability to pay. After explaining there was no justifiable

purpose for the delay and costs associated with closing escrow, the court stated the \$7,500 sanction award “[would] not result in an unreasonable burden upon [Leslie].” As the trial court concluded Leslie had the ability to pay and the sanction was not unreasonable, the court did not abuse its discretion in sanctioning Leslie \$7,500.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

O’LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.